SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1101

GLOBE INDEMNITY COMPANY,
Petitioner,

vs.

JAMES R. WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INDEX

	Page
Prayer	1
Opinions below	1
Jurisdiction	2
Question presented for review	2
Statutes involved	4
Statement of the case	5
Argument	7
Conclusion	12
Appendix A—Order of U. S. District Court	A-1
Appendix B—Opinion of U. S. Court of Appeals	A-3

Cases Cited

Ark-Homa Foods, Inc. v. Ward, et al., 1971, 473 S.W.2d 910 12

Erie Railroad Company v. Tompkins, et al., 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 ..... 3, 7

Fidelity and Casualty Company of New York v. Jones Construction Company, 1961, DCEDArk., 200 F.Supp. 264 11-12

Griffin v. Long, et al., 1910, 96 Ark. 268, 131 S.W. 672 ..9, 10

Madison County Farmers Association v. American Employers Ins. Co., 1954, 8th Cir., 209 F.2d 581 10

McDonald v. Mueller, 1916, 123 Ark. 226, 183 S.W. 751 9

United States Fidelity & Guaranty Co. v. Maxwell, Bank Com'r., 1922, 152 Ark. 60, 237 S.W. 708 10

Statutes Cited

Arkansas Statutes, 1947, 1962 Replacement, Vol. 3B, 37-206 ..... 4, 7

Arkansas Statutes, 1947, 1966 Replacement Vol. 6, 66-2406 .....2, 3, 5, 7, 8, 11, 12

28 U.S.C.A., Section 1254(1) 2

28 U.S.C.A., Section 2101(c) 2

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To the United States Court of Appeals for the Eighth Circuit

Globe Indemnity Company hereby petitions this Court to grant it a Writ of Certiorari to review the judgment of the Court of Appeals for the Eighth Circuit, decided October 30, 1974, Rehearing and Rehearing En Banc denied December 5, 1974, in this cause. In support of its petition, it respectfully shows:

OPINIONS BELOW

The opinion of the District Court for the Western District of Arkansas, El Dorado Division, in Globe Indemnity Company (GLOBE) v. James R. Williams (WILLIAMS), Civil Action No.

ED-73-C-30, is not reported. A true copy of the Order of the Court entered in favor of GLOBE is appended hereto as Appendix A. The opinion of the United States Court of Appeals for the Eighth Circuit in WILLIAMS, Appellant v. GLOBE, Appellee, Cause No. 74-1287, reversing the District Court, is reported at 507 F.2d 837. A true copy of that opinion is appended hereto as Appendix B.

JURISDICTION

WILLIAMS, the defendant below, appealed this case to the Court of Appeals for the Eighth Circuit from an Order of the District Court granting a Motion for Summay Judgment to GLOBE. It is the decision of the Eighth Circuit, reversing the District Court's summary judgment in favor of GLOBE which is sought to be reviewed here. This Petition is being filed within ninety (90) days of the entry of such judgment of December 5, 1974 pursuant to 28 U.S.C.A., Section 2101(c). The jurisdiction of this Court to review the judgment and decision in this case by Writ of Certiorari is conferred by 28 U.S.C.A., Section 1254(1).

QUESTION PRESENTED FOR REVIEW

The litigation here begun by GLOBE is under the Arkansas Insurance Code 66-2406 at section (1) which makes "Fidelity insurance" one of the three categories of "Surety insurance". The question involves whether the "sixth" or the "fourth" of the six sections of the three year limitation Arkansas Statute, 37-206, shall apply to a suit by petitioner, GLOBE, under its "Fidelity insurance" filed June 7, 1973, against respondent, WILLIAMS, for a payment of $44,475.56 made by GLOBE to Monsanto Company (MONSANTO) on August 31, 1970, by reason of embezzlements by WILLIAMS while employed at

MONSANTO which were discovered by MONSANTO not later than March 12, 1970.

Can the Eighth Circuit disregard the application of Section 66-2406 of the Arkansas Insurance Statute which distinguishes between "Fidelity insurance" with its three party surety characteristics as against two party insurance policies between an insurer and an insured, or between ordinary contracts, or disputes which do not have the characteristics of a surety arrangement? The three year Arkansas Statute of Limitations, Section 37-206, which states the six types of actions that shall be commenced within three (3) years after the cause of action accrues presents a different yardstick for the application of the three years when the "fourth" section which states "all actions founded on any contract or liability, express or implied," is used instead of the "sixth" section which states "actions for taking or injuring any goods or chattels", in the context of Section 66-2406.

WILLIAMS contends that the "sixth" section applies which runs the statute from March 12, 1970 and makes the suit filed June 7, 1973 untimely. GLOBE contends that the "fourth" section applies which extends the three year statute from August 31, 1970, the date of payment, and thus make the suit timely. Further, that in any event the action did not accrue as to GLOBE until the date of payment, August 31, 1970.

The question has substantial significance under *Erie Railroad Company v. Tompkins, et al.*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, because the Arkansas Statute 66-2406 making "Fidelity insurance" the same as "Surety insurance" was not considered or applied by the Eighth Circuit in deciding the case on the "sixth" section, rather than the "fourth" section, of 37-206.

STATUTES INVOLVED

Arkansas Statutes, 1947, 1962 Replacement, vol. 3B, 37-206

37-206. Actions which must be brought in three years —Contracts not in writing—Rent—Trespass—Libel—Injury to goods.—The following actions shall be commenced within three [3] years after the passage of this act, or, when the cause of action shall not have accrued at the taking effect of this act, within three [3] years after the cause of action shall accrue; First, all actions (of debt) founded upon any contract, obligation, or liability, (not under seal [and not in writing],) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other State; (second, all actions upon judgments rendered in any court not being a court of record;) third, all actions for arrearages of rent (not reserved by some instrument in writing, under seal;) fourth, all actions (of account, assumpsit, or on the case,) founded on any contract or liability, expressed or implied; fifth, all actions for trespass on lands, or for libels; sixth, all actions for taking or injuring any goods or chattels. [Rev. Stat., ch. 91, § 6; C. & M. Dig., § 6950; Pope's Dig., § 8928.]

Compiler's Notes

This section in so far as it may have applied to contracts in writing is superseded by § 37-209 and, therefore, the bracketed words "and not in writing" were inserted in brackets by the compiler. The "second" clause has been enclosed in parentheses by the compiler as superseded by §§ 26-1101, 37-212. The type of actions (as debt, account, assumpsit and case), in the "first" and "fourth" clauses would seem to be obsolete because of the abolition of forms of action under § 27-201, and such words have been enclosed in parentheses by the compiler. The words "not under seal" and "not reserved by some instrument in writing, under seal" appeared in parentheses in the act.

"This act" referred to in this section is ch. 91 of the Revised Statutes, the effective provisions of which are compiled as §§ 37-105, 37-108, 37-109, 37-201—37-204, 37-206, 37-213—37-225, 37-229, 37-232, 37-233, 38-103.

Arkansas Statutes, 1947, 1966 Replacement, vol. 6. 66-2406

66-2406. "Surety insurance" defined.—Surety insurance includes:

(1) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust.

(2) Insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship.

(3) Insurance indemnifying banks, bankers, brokers, financial or money corporations or associations against loss, resulting from any cause, of bills of exchange, notes, bonds, securities, evidence of debt, deeds, mortgages, warehouse receipts or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also insurance against loss or damage to such an insured's premises or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat. [Acts 1959, No. 148, § 77, p. 418.]

STATEMENT OF THE CASE

WILLIAMS, while an employee of MONSANTO in Arkansas in 1970 and in prior years embezzled money of MONSANTO. The embezzlement was discovered by MONSANTO not later than March 12, 1970, on which date WILLIAMS made a detailed statement of his various acts of embezzlement.

A claim was then made by MONSANTO against GLOBE under a Blanket Crime Policy dated April 24, 1965 which included "Employee Dishonesty Coverage" guaranteeing the fidelity of MONSANTO employees. On August 31, 1970 GLOBE paid MONSANTO $44,475.56, representing the total amount of the ascertained loss less a $5,000.00 deductible.

GLOBE filed suit against WILLIAMS for the $44,475.56 on June 7, 1973 in the El Dorado Division of the District Court for the Western District of Arkansas. Cross-motions for summary judgment were filed.

The District Court gave judgment for GLOBE. WILLIAMS appealed. The Eighth Circuit reversed the trial court. GLOBE sought a rehearing which the Appeals Court denied on December 5, 1974. Hence this Petition for Certiorari.

ARGUMENT

Here, the question under Supreme Court Rule 19(b), is whether the Eighth Circuit's decision is in conflict with the law of the State of Arkansas when it disregards Section 66-2406, enacted in 1959. The construction and effect of Section 66-2406 is to define "Fidelity insurance" as one of three categories of "Surety insurance."

It is for this reason this Court is being asked to grant a writ of certiorari to resolve a conflict in the application of the "fourth" and the "sixth" sections of the three year Arkansas Statute of Limitations, Section 37-206, as either the "fourth" or the "sixth" will apply to this case involving, as it does, the rights of the GLOBE as an underwriter of "Surety insurance" as defined by Section 66-2406.

The Effect of Erie v. Tompkins: *Erie Railroad Company, Petitioner v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 1194, held:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Where the construction and effect of an Arkansas State Statute is concerned, the Eighth Circuit has no discretion other than to give effect to 66-2406 as it is enacted in Arkansas. The fact that the Supreme Court of Arkansas has not passed directly upon a case with the facts here involved is not a matter of concern in the face of Section 66-2406. Section 66-2406 should be read into this case, and GLOBE is entitled to its application as a fidelity insurer writing "Surety insurance."

The Cases Cited in the Eighth Circuit's Opinion: Not one of the nine cases cited by the Court of Appeals involved a case of "Fidelity insurance" which by Section 66-2406 Arkansas legislated in 1959 to be "Surety insurance" with its resulting three party relationship and right of indemnity. The reasoning of the Appeals Court in deciding the case, which petitioner respectfully submits is erroneous, is apparent from these cases cited by the Appeals Court in its decision, all of which involve either a two party agreement or dispute or a two party insurance policy. The cases involve:

1. An action by a lessor of an aircraft against an officer of a dissolved corporate lessee to recover rentals due under a lease (Air Leases, Inc.);

2. An action to recover possession of a mule where the plaintiff introduced testimony tending to show that the defendants' possession was wrongful (Conditt);

3. A case involving a common-law action for fraud and deceit and for violations of the Securities Act and Rule 10b-5 (Vanderboom);

4. An action by Wrinkles against Brown to recover $600.00 when Brown was sheriff (Wrinkles);

5. An action by Williams against Metropolitan to recover on life policies (Metropolitan);

6. An action which combined two actions by partners against a third partner to recover items alleged to be fraudulently withheld in settling the partnership (Wright);

7. An action by Watts against Ogden which involved a mortgage and a note (Ogden);

8. An action involving a claim by an insurance company after payment to an insured under an uninsured motorist provision against an uninsured motorist (American States); and,

9. An action by an uninsured motorist insurer to enjoin the defendant from asserting the Statute of Limitations as a defense in the insurer's action as subrogee (Insurance Company of North America).

The point to the above summary is that the cases relied on by the Eighth Circuit did not involve the three party relationship present in the case before this Court involving what Arkansas calls "Surety insurance."

The Basis of Globe's Right Is the Fact of Payment: Petitioner respectfully submits that when Arkansas legislated "Fidelity insurance" into the "Surety insurance" family it immediately came under the landmark case of *Griffin v. Long, et al.*, 1910, 96 Ark. 268, 131 S.W. 672, which holds that the right of the surety relates back to the date of the bond, called "Surety insurance." *Griffin* held that:

> "When one becomes surety for a principal, a liability arises upon the part of the principal to indemnify his surety for any payment which he may be compelled to make for the principal. (citations) The principal thus becomes indebted to the surety for the payments he is compelled to make for the former, and the question which arises is: Does such indebtedness have its inception from the time the party became surety, or from the time payment is made by the surety? The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same."

The point was next raised in *McDonald v. Mueller*, 1916, 123 Ark. 226, 183 S.W. 751, when that court followed *Griffin* in holding that:

> "(p. 753) The question involved here is not merely the time when a surety may sue his principal, for in such

> case the statute of limitations does not run as against the surety until he has paid the debt, * * * In the ordinary relation between principal and surety there is an implied contract of indemnity, which is not breached until the surety has been called upon to make good the default of his principal, and this was the action which appellant set up in his crosscomplaint in the original suit by the payee of the notes against him and appellee, and the period of limitation against that action is three years."

The issue in *Griffin* was next followed in *United States Fidelity & Guaranty Co. v. Maxwell, Bank Com'r.*, 1922, 152 Ark. 60, 237 S.W. 708, 713, where the Arkansas court quoted *Griffin* and also the following:

> "(712) In 25 R.C.L. p. 1328, it is said:
>
> "This right of a surety to subrogation stands upon the principles of natural justice. Payment by the surety is deemed equivalent to a purchase from the creditor, and operates as an equitable assignment of the debt, and all its incidents, to the former. It has well been said that in these cases the law creates or implies a contract on the part of the creditor that such (p. 713) property or securities will be turned over to the one who is secondarily liable as soon as he pays the creditor's claim. The right of a surety to subrogation begins with the contract of suretyship, and is not simply inchoate until he pays the debt."

It should be remembered that the "Fidelity insurance" involved here was executed by GLOBE for MONSANTO on April 24, 1965 (Cf. Statement of the Case, supra).

The closest case out of Arkansas that extensive research has developed is *Madison County Farmers Association v. American Employers Ins. Co.*, 1954, 8th Cir., 209 F.2d 581 (af-

firming 112 F.Supp. 753), where in construing a contract to indemnify an employer for his employee's infidelity the Appeals Court pronounced the law of Arkansas when it said at page 584:

> "[1] The applicable law is well stated in the article on suretyship in Volume 50, Am.Jur., Section 313, at page 1108, reading in part as follows:
>
> > 'While it is a rule that the courts, in construing an ambiguous provision in a compensated surety contract, apply the rules applicable to insurance contracts, and while insurance contracts are in many respects similar to surety company contracts, yet, it is said, there is a wide difference between the two contracts. Insurance has been defined as a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event; whereas a contract of suretyship is one to answer for the debt, default or miscarriage of another, and the nature of the contract is not altered because made by a corporation for compensation. The contract creates a tripartite relation between the party secured, the principal obligor, and the surety, and the rights, remedies and defenses of a surety cannot be disassociated from this relationship although the contract is called one of insurance. * * *'
>
> This pronouncement expresses, we think, in principle the law of Arkansas."

All the above cases are Arkansas cases; all involved suretyship; and, all were decided before 1959 when section 66-2406 became an Arkansas Statute.

Collateral Cases Not Involving "Surety insurance": In *Fidelity and Casualty Company of New York v. Jones Construction*

Company, 1961, DCEDArk., 200 F.Supp. 264, which was a diversity indemnity action by insurers subrogated to rights of architects who had been held liable for injuries suffered by a construction contractor's employees when an excavation wall caved in that court held:

> "(p. 266) As to the action being barred by statutes of limitation or by laches, it may be noted that normally the statute of limitations runs in favor of the principal obligor, where indemnity is owed, from the time when payment of the obligation is made. Restatement, Restitution sec. 77 (1937)."

In *Ark-Homa Foods, Inc. v. Ward, et al.*, 1971, 473 S.W.2d 910, decided by the Supreme Court of Arkansas, which involved an action to recover for losses to insured goods, that court ended up its decision with the following paragraph:

> "The attempt to substitute another party or parties for Ark-Homa Foods was more than three years after the insurers paid the losses. There is no doubt but that the three year statute of limitations had run. Ark. Stat.Ann. Sec. 37-206 (Repl.1962)."

The above cases support Petitioner's submission that the Appeals Court was in error in its holding (p. 840) "that Globe had no separate right to indemnification on the facts of this case".

CONCLUSION

GLOBE respectfully submits that in Arkansas, by statute since 1959 and both before and after 1959 by case law, "Fidelity insurance" is suretyship with its three party interrelationships and obligations and rights. Section 66-2406 should be given the meaning which the Arkansas Legislature, in 1959, meant "Fidelity insurance" to have. There is the difference be-

tween night and day in the difference between "Fidelity insurance" and the other types and kinds of insurance policies, whether automobile, casualty, or whatever.

GLOBE, just as every insurer, can never be certain when the date is that a purchaser of its coverage, whether called a policy, or a bond, or a contract of insurance, first discovers it has sustained a loss by reason of the infidelity of its employees holding positions of trust.

All the GLOBE can know with certainty is the date of its payment on the loss. It is this date, August 31, 1970, that should control the application of the limitations statute 37-206 at section "four" in this case. And WILLIAMS, the former employee of MONSANTO, was obligated to GLOBE the same as any principal under any contract of a surety.

This is an important state question which has been decided by the Appeals Court in a way in conflict with the Arkansas Statute, and also Petitioner submits, under the Arkansas case law. The result of the Appeals Court decision will be substantial and never ending confusion, not only for GLOBE, but for every insurance company. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted

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APPENDIX A

In the United States District Court
Western District of Arkansas
El Dorado Division

Globe Indemnity Company, Plaintiff,

vs. No. ED-73-C-30.

James R. Williams, Defendant.

ORDER

(Filed in U. S. District Court April 1, 1974)

Now on this 13th day of March, 1974, came on before the Court for hearing the Motion of the defendant, James R. Williams, for summary judgment and the cross-motion of the plaintiff, Globe Indemnity Company, for summary judgment.

The matter being presented upon the motions of the plaintiff and the defendant for summary judgment and the exhibits to such motions and the briefs of counsel on behalf of the parties and other things and matters before the Court, from all of which the Court being well and sufficiently advised doth find:

That it has jurisdiction of the parties and the subject matter sufficient for the consideration of these matters on motion for summary judgment and the entry of Order of Court pursuant thereto; that there remains no genuine issue of fact in dispute and that the cause is in a condition that it can be disposed of upon the motions for summary judgment; that the motion for summary judgment by the defendant, James R. Williams, ought

in law and equity to be denied and the motion for summary judgment by the plaintiff, Globe Indemnity Company, ought to be granted.

It Is Therefore by the Court Considered, Ordered, Adjudged and Decreed that the motion of the defendant, James R. Williams, for summary judgment be and the same is hereby denied and the motion of the plaintiff, Globe Indemnity Company, for summary judgment be and the same is hereby granted and the plaintiff, Globe Indemnity Company, be and it is hereby granted judgment against the defendant, James R. Williams, for the sum of $44,475.56 together with interest thereon from March 13, 1974, until paid at the rate of six (6) per cent per annum and for costs of this proceeding and for all of which execution, garnishment or other writ in aid of judgment may issue.

Given Under my Hand as Judge of the El Dorado Division, United States District Court, Western District of Arkansas, this 1st day of April, 1974.

s OREN HARRIS
United States District Judge

Approved as to Form:

s WILLIAM S. ARNOLD
Attorney for Plaintiff

s RICHARD H. MAYS
Attorney for Defendant

APPENDIX B

James R. Williams,

Appellant,

v.

Globe Indemnity Company,

Appellee.

No. 74-1287

United States Court of Appeals
Eighth Circuit

Submitted Oct. 14, 1974

Decided Oct. 30, 1974

Rehearing and Rehearing En Banc

Denied Dec. 5, 1974

Employer's crime insurer, which had paid employer amount embezzled by employee, brought action against employee. The United States District Court for the Western District of Arkansas, Oren Harris, J., denied defendant's motion for summary judgment based on a statute of limitations defense, and granted summary judgment in favor of the insurer and defendant appealed. The Court of Appeals, Heaney, Circuit Judge, held that crime insurer became subrogated to insured and was subject to identical three-year statute of limitations as was insured, and, having failed to bring action against employee within three years of discovery of the embezzlement, insurer's cause of action against employee was barred, notwithstanding insurer's claim

that it had some broader right to indemnity and that its own cause of action did not accrue under statute until its payment to insured.

Reversed and remanded with directions.

Insurance Key 606(9)
Limitation of Actions Key 56(2)

Crime insurer, which paid insured employer amount embezzled by insured's employee and became subrogated to insured, was subject to identical three-year statute of limitations as was insured, and, having failed to bring action against employee within three years of discovery of the embezzlement insurer's cause of action against employee was barred, notwithstanding insurer's claim that it had some broader right to indemnity and that its own cause of action did not accrue under statute until its payment to insured. Ark.Stats § 37-206.

Richard H. Mays, Mays & Landers, El Dorado, Ark., for appellant.

Francis L. Kenney, Jr., St. Louis, Mo., and William S. Arnold, Crossett, Ark., for appellee.

Before Heaney, Bright and Ross, Circuit Judges.

Heaney, Circuit Judge.

Appellant Williams embezzled approximately $50,000 from his employer, Monsanto. The embezzlement was discovered by March 12, 1970, and Williams confessed in detail to his employer on that date. The employer made a claim against its insurer (Globe), the appellee, on a blanket crime policy, and Globe paid the employer the amount embezzled, minus a deductible,

on August 31, 1970. Globe brought this diversity action against Williams on June 7, 1973, to recover the sum paid. Summary judgment was granted in favor of Globe. The sole issue presented on appeal is whether or not the District Court erred in denying Williams' motion for summary judgment based on a statute of limitations defense. We hold that Globe's action was barred by the statute of limitations and, therefore, reverse and remand with directions to enter judgment in favor of appellant Williams.

Both parties agree that the applicable statute of limitations is Arkansas Statute 37-206, which provides:

> The following actions shall be commenced within three [3] years after * * * the cause of action shall accrue: First, all actions (of debt) founded upon any contract, obligation, or liability, (not under seal [and not in writing],) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other State; * * * fourth, all actions (of account, assumpsit, or on the case,) founded on any contract or liability, expressed or implied; * * * sixth, all actions for taking or injuring any goods or chattels.

This statute has been held to apply to actions based upon common law fraud, deceit, or conversion. *See*, Air Leases v. Baker, 167 F.Supp. 145, 148 (W.D. Ark. 1958); Conditt v. Holden, 92 Ark. 618, 123 S.W. 765 (1909); Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852, 91 S.Ct. 47, 27 L.Ed.2d 90 (1970) (dictum). Globe does not deny that it applies to the embezzlement here. The statutory period under this enactment commences to run at the time of the discovery of the fraud. *See*, Wrinkles v. Brown, 217 Ark. 393, 230 S.W.2d 39, 41 (1950); Metropolitan Life Ins. Co. v. Williams, 197 Ark. 883, 125 S.W.2d 441, 448 (1939); Wright v. Lake, 178 Ark. 1184, 13 S.W.2d 826, 827 (1929). Since the employer discovered the embezzlement on March 12, 1970, the statute of

limitations barred the employer's cause of action for recovery of the money after March 12, 1973.

Globe contends that, notwithstanding foreclosure of the employer, its own cause of action did not "accrue" under the statute until its payment to Monsanto. Since suit was brought within three years of that date, it argues that the District Court was correct in holding that its action was not barred. The appellant contends, on the other hand, that Globe is suing solely in its capacity as subrogee of the rights of the employer, and that it is settled law that a subrogee can acquire no more rights against a third party than are held by its subrogor. Hence, he argues, Globe is subject to the identical bar under the statute as was its subrogor, Monsanto, and having failed to bring the action within three years of the discovery of the embezzlement, Globe's cause of action is barred. We agree with the latter view.

The theory of subrogation is that the subrogee steps into the shoes of his subrogor. As such, he takes subject to all defenses which the third party could have asserted against the subrogor, including the statute of limitations:

> Since the insurer's claim by subrogation is derivative from that of the insured, it is subject to the same statute of limitations as though the cause of action were sued upon by the insured. * * *

16 Couch, Insurance 2d § 61:230 at 367 (1966) (footnotes omitted).

This general rule of subrogation law was recognized by the Arkansas Supreme Court in Ogden v. Watts, 186 Ark. 500, 54 S.W.2d 292 (1932):

> It is the law, however, as is very clearly stated in Charmley v. Charmley [125 Wis. 297, 103 N.W. 1106 (1905)], that the right acquired by the party thus subrogated

> is to use the security just as the original holder thereof might have done, and that "the devolution of such cause of action does not interrupt the running of the statute. Upon the termination of the full statutory period measuring the life thereof, it is destroyed. * * * To enable a person to see what interest one has in the property of another by the right of subrogation, he must look at the matter from the viewpoint of the original owner before the devolution." [*Id.* at 1111.]

Ogden v. Watts, *supra* at 292.

Admittedly, the *Ogden* case is distinguishable since the statute of limitations had already expired on the subrogor's claim before the subrogation took place, and, therefore, the subrogor had no viable cause of action to convey to the subrogee. But the *Charmley* case, which is quoted, involved a subrogation which took place before the statute had expired, and the court there held that the act of subrogation had not affected the running of the statute:

> * * * As we have said, where once the statute of limitations has commenced to run on a cause of action, no circumstance, not expressly provided by statute—and we have no statute applying to the circumstances here—will interrupt it. * * *

Charmley v. Charmley, *supra*, 103 N.W. at 1111.

Two recent cases in other jurisdictions have reached the same result where an insurance company became subrogated to its insured by paying off an uninsured motorist claim, and then proceeded to sue the uninsured motorist after the statute of limitations would have barred a direct action by the insured. *See*, American States Ins. Co. v. Williams, 278 N.E.2d 295 (Ind.App. 1972); Insurance Co. of North America v. Carnahan, 446 Pa. 48, 284 A.2d 728 (1971). In each instance, the court held that

the statute began to run from the date of the accident, rather than the date of the award or payment to the insured. We agree that this is the proper rule and, therefore, hold that since the subrogor, Monsanto, was barred by the statute, Globe, as its subrogee, was also barred.

We turn briefly to Globe's alternate contention that an implied or "quasi" contract of indemnity arose upon payment by Globe to the employer, under which contract Williams only then became obligated to reimburse Globe. The cases cited by Globe do not support this argument.

For example, Wolverine Ins. Co. v. Tower Iron Works, Inc., 370 F.2d 700 (1st Cir. 1966), was an action for allocation of loss between two tortfeasors. There, a person injured while diving into a swimming pool settled with the pool owner's insurance company. The insurer then sued the installer of the pool for indemnification, and the installer claimed that it could no longer be sued because the pool had been installed eight years earlier. The Court made it clear that it permitted suit only on a theory of common law indemnity which was triggered because the owner and installer were "two tort-feasors not *in pari delicto*" *Id.* at 703. Here, on the other hand, no joint tortfeasors are involved, and there is but classic subrogation.

Federal Ins. Co. v. Summers, 330 F.Supp. 1041 (D.Mass. 1970), also fails to support Globe's theory. In that case, a customer made a deceitful misrepresentation, in 1958, to a brokerage house (Hutton). He claimed that he had not received certain securities. New securities were delivered to the customer and an indemnity bond was entered into by an insurance company in reliance on the customer's proof of loss statement. The fraud was concealed until 1966; on discovery, the insurer paid Hutton for the loss and promptly brought a successful action against the customer. That case can be distinguished from the present one on two grounds: (1) the customer had made a

direct misrepresentation to the insurer in submitting the false proof of loss; and (2) the statute of limitations had *not* expired against the *subrogor* (Hutton), because the fraudulent concealment had tolled its running. Thus, *Federal Insurance* is fully consistent with the rule that a subrogee is barred by the same limitation period as is the subrogor.

Globe's contention that it is not suing solely on a narrow theory of subrogation, but has some broader right to indemnity, is similar to a claim rejected by the court in American States Ins. Co. v. Williams, *supra*, 278 N.E.2d at 299-300:

> The point of departure between the parties is not whether the right of subrogation existed but rather the exact nature of the right. Appellant argues that the insurer acquires the right of indemnification against Appellee when actual payment is made to its insured, thereby implying that an insurer has some type of implied contract or liability imposed by law vis-a-vis the uninsured motorist * * *.
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> * * * * * * *
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> As a general rule, indemnity is not allowed absent an express or implied contract. There are, however, certain exceptions as between joint tort-feasors, one of whom was liable only because of his relationship to the other joint tort-feasor, or because of a specific statute where the right is imposed. None of these exceptions are applicable to this case.
>
> The duty of the insurer to pay damages arises solely out of its contract with its insured and not by reason of any special relationship between the insurer and the uninsured motorist. The rights acquired by the insurer upon payment to the insured are solely derivative rights of subrogation. * * *
>
> * * * * * * *

> * * * Thus, the insurer stands in the shoes of the insured and takes no rights other than those which the insured had, and this is true regarding the applicable statute of limitations. * * *

We conclude that Globe had no separate right to indemnification on the facts of this case. The only rights it asserted against Williams were subrogation rights derived from Monsanto. Therefore, since Globe's subrogor would have been barred by the statute of limitations, it was error for the District Court to refuse to grant summary judgment in favor of defendant Williams. The judgment below is accordingly reversed and the cause remanded with directions to enter judgment in favor of Williams and against plaintiff Globe.